Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies	)	**MM Docket No. 98-204**
	)	
and	)	
	)	
Termination of the EEO Streamlining Proceeding	)	**MM Docket No. 96-16**

To: The Commission

COMMENTS

Respectfully submitted,

THE AMERICAN CENTER FOR LAW & JUSTICE

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SUMMARY

The Commission's rulemaking proposal in Review of the Commission's Broadcast and Equal Employment Opportunity Rules and Policies, FCC 98-305, attempts to address the D.C. Court of Appeals' decision in Lutheran Church Missouri-Synod v. FCC, 141 F.3d 344, rehearing denied, 154 F.3d 494 (D.C. Cir. 1998), by requiring broadcasters to simply "recruit." While a broadcaster would purportedly be under no obligation to actually "hire" minorities it "recruited" they must nevertheless engage in self-assessment concerning the effectiveness of their recruitment programs. The Commission would then expect broadcasters, when conducting their "self assessment," to analyze their success in "hiring and promoting" minorities. Such a constraint, however, fails to respond to the Lutheran Church decision, and no significant record has been provided that "recruitment" will in fact foster a "diversity of view points."

Moreover, the Commission's proposal that broadcasters be obligated to file EEO reports is burdensome. The Commission has offered no cognizable basis for burdening broadcasters in general, and religious broadcasters in particular, with such filing requirements. The Commission's exception that it would allow religious broadcasters to use religious affiliation as a bona fide occupational qualification does not truly recognize the fundamental rights of religious broadcasters. Indeed, religious broadcasters are still "expected" to affirmatively recruit, hire and promote minorities and women.

The Commission's Notice also fails to afford religious broadcasters their full statutory and constitutional rights. The application of the Commission's proposed affirmative recruitment standards through monitoring and evaluation is tantamount to state intrusion into the governmental

affairs of a church, and thus violates the principal enunciated by the Supreme Court in Serbian Orthodox Diocese v. Milivojevich, 426 U.S 696 (1976).

Finally, the Commission's Notice does not meaningfully address the Religious Freedom Restoration Act, and the obligation that the Commission "demonstrate" that its affirmative recruitment rules furthers a compelling governmental interest and that the least restrictive means are being employed in fulfilling that interest. The Commission has manifestly failed to do this and its affirmative recruitment obligations as enunciated in the Notice should therefore not be adopted.

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To: The Commission

COMMENTS

I. INTEREST OF THE AMERICAN CENTER FOR LAW AND JUSTICE -

On February 25, 1998 the Commission issued its Streamlining Broadcast EEO Rules and Policies, 13 FCC Rcd. 6322, 11 CR (P&F) 597, 1998 WL 78418 ("Streamlining Order") (rel. Feb. 25, 1998; 63 Fed. Reg. 11376, published March 9, 1998). The American Center for Law and Justice ("ACLJ") filed a Petition for Reconsideration of the Streamlining Order. The Commission has, thus far, taken no action on the ACLJ's Petition for Reconsideration, and has now issued its Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204 (consolidating MM Docket No. 96-16), FCC 98-305, released November 20, 1998 ("Notice"), which contains many of the same defects as the Streamlining Order, particularly with reference to religious broadcasters.

The ACLJ is a nonprofit legal and educational organization dedicated to preserving religious freedoms. Some of the religious liberty cases which the ACLJ and its lawyers have successfully

litigated are Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993); Westside Community Schools v. Mergens, 496 U.S. 226 (1990); and Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987). The ACLJ files the following comments in the hope that no regulations will be adopted or implemented against broadcasters, particularly religious broadcasters, which infringe on fundamental constitutional or statutory rights. These comments also preserve all appeal rights to insure religious broadcasters are afforded their full constitutional and statutory rights.

II. INTRODUCTION -

The Notice is the latest action by the Commission in which it evidently hopes that by disengaging hiring requirements from "recruitment" requirements, it will successfully navigate out from under the constraints of the D.C. Circuit's decision in Lutheran Church Missouri-Synod v. FCC, 141 F.3d 344, rehearing denied, 154 F.3d 494 (D.C. Cir. 1998). A requirement that broadcasters "recruit" so that "minorities"[1] can then file complaints with the Commission because they were recruited but not hired is a transparent attempt to skirt the plain holding in the Lutheran Church decision.

Also, paragraph 72 of the Notice simply emphasizes the self-evident truth belied by the new "recruitment" standards. "Self-assessment" is to include "that an entity be required to analyze its efforts to recruit, **hire, and promote** in a non-discriminatory fashion and address any difficulties in implementing its EEO program." (Emphasis added). Thus, the reality is that this "recruitment" rule is to result in an "EEO program" in which the effectiveness of a broadcaster's hiring of minorities

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[1] The Ninth Circuit has held that women are a majority of the population in many states, and thus, shall not be regarded as "minorities." *See* The Coalition for Economic Equity v. Wilson, 110 F.3d 1431, 1442 n. 13 (9th Cir. 1997).

is to be assessed. The failure to comply with these "recruitment" (hiring) standards would then be used to determine if a licensee should be sanctioned or denied renewal.

To "recruit" means "to strengthen or supply with fresh or additional members." Likewise, "recruitment" means "an act of offering inducement to qualified personnel to enter a particular job or profession." *Websters' Third New International Dictionary* (1993) at 1899. The plain purpose of recruiting, therefore, is to hire people. Requiring broadcasters to keep and maintain extensive "recruiting" records, make the necessary capital expenditures to "recruit," and sanction those broadcasters who do not sufficiently fulfill the "recruitment" criteria, is tantamount to reimplementing the previous hiring requirements. A belief that these proposed "recruitment" requirements comport with the Lutheran Church decision is to ignore the sections of the opinion which dispose of this proposed logic.

The FCC also apparently proposes to monitor such compliance with religious broadcasters by assessing the centrality of religion to the hiring. This proposal is so blatantly unconstitutional that it does not even pass muster under the standards enunciated in the governments' own briefs in the Lutheran Church appeal.

Thus, the idea that the FCC can leave its present EEO policies and requirements virtually intact under the guise of "recruitment" requirements is an unsupportable construct. Such a construct invites challenge.

III. THE FCC HAS FAILED TO SUBSTANTIATE THE GROUNDS FOR IMPLEMENTING THESE AFFIRMATIVE ACTION RECRUITMENT REQUIREMENTS, AS WAS REQUIRED BY THE COURT

There have been two traditional pillars which have been used for decades to support FCC regulation of broadcast employment and ownership: spectrum "scarcity" and "diversity" in the media

marketplace. The FCC continues to maintain that "diversity of viewpoint" remains a concern by virtue of the scarcity of the available media to express those viewpoints. *See* In the Matter of Suspension of Filing Requirement for Broadcast Station Annual Employment Reports and Program Reports, FCC 98-250 (released September 29, 1998) at 3. Without scarcity of resources to restrict the flow of viewpoints and ideas, the issue of "diversity" of viewpoints necessarily ceases to be a viable factor. For example, diversity of viewpoint is certainly not an issue on the Internet where, by some estimates, there are over 320 million websites.[2]

However, it is no longer enough to simply assert that "diversity" and "scarcity" are sufficient to meet the threshold standards to uphold their validity. In regard to the prior integration preference standards the D.C. Circuit held in Bechtel v. FCC, 10 F.3d 875 (D.C. Cir. 1993) that, "[d]espite its twenty-eight years of experience with the policy, the Commission has accumulated no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it. . . ." Bechtel, 10 F.3d at 880. The FCC's various justifications for its determinations as to ownership were also deemed "implausible." *Id.* Thus, without the underlying factual showing the underlying justification for the integration policy, it was deemed "arbitrary and capricious." *See also,* Bechtel, 10 F.3d at 881 (rejecting the FCC's quantitative numerical formula for integration determinations); *id.* at 883 (rejecting the FCC's financial interest formula for integration determinations); *id.* (rejecting the FCC's legal accountability standards for integration determinations); *id.* At 884 (rejecting the FCC's integrated versus absentee owners standards); *id.* At 885 (rejecting as "sheer myth" the FCC's

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[2] The scarcity rationale continues to erode in the modern media marketplace. For example, the Commission released on February 3, 1999 a rulemaking to create literally thousands of low and/or micro-powered FM radio stations throughout the country. Low Power FM Radio Service, MM Docket. No. 99-25, FCC 99-6.

rationale that on-site owners are more informed about station operations and problems). The Notice suffers this same failing–no record is presented that supports the proposed policy.

Most notable among the Bechtel Court's rejection of the various rationale put forth by the Commission supporting integration was its rejection of the objectivity rationale -- that the structure of the integration standards led to greater objectivity in deciding amongst competing applications. The Bechtel Court found that such "objectivity" was "illusory," merely lending a "veneer of precision." *Id.* at 885.

In the Bechtel case, the Commission had rewarded some applicants with integration credit and disadvantaged others for failing to follow its integration criteria. The Bechtel court ultimately put the FCC to the task of justifying through a factual showing why and how the enforcement of the integration policy advanced the asserted public interest (i.e., more programming responding to local interests). The D.C. Circuit ruled that the FCC had notably failed this task.

Likewise, in the Lutheran Church decision the D.C. Circuit once again delivered the message that assumptions were insufficient to support policies. Specifically, the Court called into question whether the necessary factual predicate had been established to substantiate the "diversity" rationale as it had been applied to the Lutheran Church. In finding the "diversity" rationale implausible, the Court began by noting that the "Commission never defines exactly what it means by 'diverse programming.'" Lutheran Church, 141 F.3d at 354. The Court found it significant that: "[n]or did the Commission introduce a single piece of evidence in this case linking low-level employees to programming content," *Id.* at 355, in the context of justifying its diversity rationale.

Without any evidence to support diversity, the Court was left with the Commission's internally inconsistent explanation upholding the rationale, which the Court rejected outright:

> The Commission reprimanded the Church for preferring Lutheran secretaries, receptionists, business managers, and engineers precisely because it found these positions not 'connected to the espousal of religious philosophy over the air.' Yet it has defended its affirmative action rules on the ground that minority employees bring diversity to the airwaves. The FCC would thus have us believe that low-level employees manage to get their 'racial viewpoint' on the air but lack the influence to convey their religious views. That contradiction makes a mockery out of the Commission's contention that its EEO program requirements are designed for broadcast diversity purposes. The regulations could not pass the substantial relation prong of intermediate scrutiny, let alone the narrow tailoring prong of strict scrutiny.

Id.[3] It is clear from this ruling that the Commission was tasked with two responsibilities. First, the Commission was tasked with defining the term "diversity." The Notice does not attempt to do this.

Second, the Commission was tasked with determining "whether it has authority to promulgate an employment non-discrimination rule." *Id.* at 356. The Court made it clear that *any* justification upholding the present non-discrimination rule would "be subjected to detailed judicial inquiry." *Id.* at 354 (citation omitted). As the Ninth Circuit set forth the standard in The Coalition for Economic Equity v. Wilson, 110 F.3d 1431, 1439 (9th Cir. 1997):

> Any governmental action that classifies persons by race is presumptively unconstitutional and subject to the most exacting judicial scrutiny. To be constitutional, a racial classification, regardless of its purported motivation, must be narrowly tailored to serve a compelling governmental interest, an extraordinary justification. When the government classifies by gender, it must demonstrate that the classification is substantially related to an important governmental interest, requiring "exceedingly persuasive" justification.

(Citations omitted). The FCC makes no attempt in this Notice to make compelling, exceedingly persuasive, or even rational justification for its "recruitment" requirements.

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[3] Paragraph 34 of the Notice, which argues for EEO requirements for all job categories for diversity purposes, blatantly ignores this portion of the Lutheran Church decision which disposes of this justification.

Thus, pursuant to both the Bechtel and Lutheran Church cases, the FCC must show that there is at least a rational, if not compelling factual basis for the underlying regulations. Reiteration of past justifications for the new "recruitment" requirements are insufficient. There must be an underlying authority to propound the regulations, and a concomitant fact-based rationale for the implementation of those regulations[4]. The authority of the Commission to propound affirmative action regulations, whether under the guise of "recruitment" or straightforward hiring requirements is, at best, questionable. The underlying factual justification for the new "recruitment" requirements is nonexistent. Therefore, the proposed regulations are unconstitutional and readily susceptible to challenge.

IV. THE *LUTHERAN CHURCH* DECISIONS DECLARED THE PREVIOUS EEO REQUIREMENTS TO BE UNCONSTITUTIONAL – THE PROPOSED EEO REQUIREMENTS FARE NO BETTER

Preventing employment discrimination was not relied upon by the FCC in the Lutheran Church case as a basis for upholding the EEO requirements. Nonetheless, the Justice Department in its *amicus curiae* capacity, urged this rationale upon the Court[5]. The Court soundly rejected this rationale by stating:

> The Justice Department, on the other hand, argues that the FCC's policy is supported by the twin governmental goals of seeking diversity of programming and preventing employment discrimination. It may be that the Commission has framed its objective more narrowly because it doubts that it has authority to promulgate regulations on anti-discrimination rationale. As we have observed elsewhere, "the FCC is not the Equal Employment Opportunity Commission . . . and a license renewal is not a Title

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[4] ACLJ does not take the position that the FCC has no authority to regulate in the area of equal employment opportunity. Merely, that there are requisite thresholds which must be met, which have not been met here.

[5] *Final Brief for the United States as Amicus Curiae* (Dec. 12, 1997) at Section II.

> VII suit." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C.Cir. 1978) (en banc).

Id. at 353. There are intimations throughout this Notice that the FCC is now adopting this rejected rationale for the proposed "recruitment" requirements.

The citations in the Notice at ¶¶ 26 - 29 say nothing about implementing affirmative action recruitment requirements. They simply state that Congress does not want racial or gender discrimination in broadcasting. That is different from creating the proposed affirmative action recruitment requirements out of whole cloth. To the extent that the 1992 Cable Act, Section 22(a) repeats the errant "diversity in the expression of views" as justification for any EEO policies, such justification has already been soundly rejected by the D.C. Circuit in Lutheran Church, 141 F.3d at 354.

The justification articulated by the Commission has always been "that its EEO regulations rest solely on its desire to foster 'diverse' programming content."*Id.* That is also the pretext for the present regulations as well. *See* Notice at 9-11. The Court found this "diversity in broadcasting" rationale to be without basis or justification. *E.g.,* Lutheran Church, at 354 ("We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them. One might well think such an approach antithetical to our democracy").

The D.C. Circuit's reasoning was based on the U.S. Supreme Court's decision in Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995). In Adarand, the Supreme Court reversed its prior ruling in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), which previously upheld the FCC's minority ownership preference rules, by declaring that the government lacks a compelling interest in imposing such race-based regulations upon broadcasters. Adarand, 515 U.S.

at 225. The Adarand Court held that "*Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over fifty years. . . ." *Id.* 515 U.S. at 231.[6]

In order to pass the strict scrutiny test as enunciated in Adarand, the Commission's proposed EEO affirmative action/recruiting rules must show that the racial/gender employment requirements are based upon evidence that broadcasters have discriminated against specific persons *because* of their race or gender. As the Supreme Court held in Adarand in this regard:

> . . . the Fifth and Fourteenth Amendments to the Constitution protect *persons* not *groups*. It follows from that principal that all governmental action based on race - a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited - should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection has not been infringed.

Adarand, 515 U.S. at 227 (emphasis in original, citations and internal quotation marks omitted). Simply invoking a generalized desire for "diversification" does not fulfill the evidentiary requirement that strict scrutiny necessarily demands. Additionally, attempting to force group-oriented recruitment policies violates the central tenet of the Adarand decision. As the Supreme Court held:

> What [dissenting Justice Stevens] fails to recognize is that strict scrutiny *does* take "relevant differences" into account - indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making.

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[6] The scheme in question in Adarand provided financial incentives to general contractors to hire subcontractors who had been certified as disadvantaged business enterprises on the basis of certain race-based assumptions. *Id.*, 515 U.S. at 225- 228.

Id. at 228. *See also* Hopwood v. State of Texas, 78 F.3d 932, 944-48 (5th Cir.), *rehearing denied* 84 F.3d 720, *cert. denied* 117 S.Ct. 608 (1996) ("diversity" as a justification for racial admissions preferences for the University of Texas School of Law not a compelling interest). Thus, the D.C. Circuit in the Lutheran Church case used the unequivocal standards in Adarand to decide that the FCC's race-based hiring requirements were unconstitutional. The Court held that: "our opinion has undermined the proposition that there is any link between broad employment regulation and the Commission's avowed interest in broadcast diversity." Lutheran Church, 141 F.3d at 355.

Any recruitment, hiring, or promotion requirements based on the generalized desire for "diversity" are likewise unconstitutional.[7] As the Court stated in this regard:

> We need not decide this question, however, because the EEO regulations before us extend beyond outreach efforts and certainly influence ultimate hiring decisions. The crucial point is not, as the Commission and DOJ argue, whether they require hiring in accordance with fixed quotas; rather, it is whether they oblige stations to grant some degree of preference to minorities in hiring. We think the regulations do just that.

Id. at 351. Thus, the Court remanded the case in part to enable the FCC to "determine whether it has authority to promulgate an employment non-discrimination rule." *Id.* at 355. Accordingly, before the FCC can adopt a recruitment rule and require broadcasters, including religious broadcasters, to file EEO Forms under the rubric of enforcing "diversity in recruitment," it must first show that it has the authority to promulgate such regulations in the first place. The Commission has not accomplished this task.

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[7] The anti-discrimination rules under 47 CFR § 73.2080(a) are not based on a "diversity" rationale, but instead prevent discrimination based on race, gender, religion, or nationality. The ACLJ supports such anti-discrimination legislation.

V. THE D.C. CIRCUIT HAS RULED THAT THE EEO STANDARDS ARE UNCONSTITUTIONAL, AND THAT THE FILING REQUIREMENTS ARE BURDENSOME

The Notice requires that broadcasters continue to file FCC Equal Employment Opportunity forms. Notice at ¶ 73. In Lutheran Church, however, the D.C. Circuit declared that the FCC EEO filing rules, 47 CFR § 73.2080 (b) & (c), violated the equal protection component of the Fifth Amendment. Lutheran Church, 141 F.3d at 355 ("We therefore conclude that its EEO regulations are unconstitutional and cannot serve as a basis for its decision and order in this case"). Thus, the requirement that broadcasters continue to file forms which show compliance with "recruitment" goals would be *ultra vires* and unconstitutional.

The FCC declared in its Streamlining Order that despite a new "policy" toward religious broadcasters, compliance with the EEO filing requirements nonetheless remain in effect. Under the Streamlining Order, religious broadcasters:

> remain subject to Sections 73.2080(b) and (c) of the Commission's Rules, 47 C.F.R. §§ 73.2080(b) and (c), requiring broadcast licensees to maintain a positive continuing program of specific practices designed to ensure equal employment opportunity, for persons who share their faith, in every aspect of station employment and practice. We hereby emphasize this continuing obligation notwithstanding any suggestion to the contrary in Lutheran Church/Missouri Synod, 12 FCC Rcd 2152, 2166 n.9 (1997), appeal pending. We shall also continue to require religious broadcasters to file Forms 396-A, 396 and 395-B, and will still examine their EEO programs at renewal time, as well as other relevant periods, to determine if they have complied with our EEO Rule, inquire further if there is evidence of lack of compliance, and take appropriate action if violations have occurred.

Streamlining Order at ¶ 9. The Notice follows this same expectation, and proposes that even for positions which require religious affiliation as a *bona fide* occupational qualification, the religious broadcaster "would be expected to make reasonable good faith efforts to recruit minorities and women." Notice at ¶ 71. Additionally, the Notice will require broadcasters to complete and

maintain virtually identical forms that were required prior to the Lutheran Church decision. Both sets of requirements are inherently unconstitutional.

Additionally, the Lutheran Church Court ruled that such EEO compliance requirements are burdensome:

> And the remedial reporting conditions, which require the Church to keep extremely detailed employment records, further aggrieve the Church by increasing an already significant regulatory burden. Independent of the order, the regulations cause the Church economic harm by increasing the expense of maintaining a license. Every broadcast station must develop a fairly elaborate EEO program and document its compliance. 47 C.F.R. § 73.2080(b) & (c). Particularly for smaller stations like KFUO(AM) and KFUO-FM, this requirement can be burdensome.

141 F.3d at 349-350.

Like the underlying recruitment requirements themselves, the recruitment and filing requirements to be applied to religious broadcasters are without agency justification. Without any compelling justification, the rules are unconstitutional.

VI. THE PROPOSED FILING REQUIREMENTS VIOLATE RELIGIOUS BROADCASTER' RELIGIOUS LIBERTY RIGHTS

A. As The Supreme Court Held In *Milivojevich*, Religious Bodies Should Be Free To Decide Matters of Church Government Free From Government Oversight

Two months after the Lutheran Church Court heard arguments on the Church's appeal of the FCC decision, the FCC requested (for a second time) a remand of the case based upon the Streamlining Order, and its new policy concerning religious broadcasters. The Streamlining Order was poorly conceived and quickly executed in a vain attempt to undermine the D.C. Circuit's jurisdiction over the issues in the Lutheran Church case. As the Lutheran Church Court said of this gambit: "the Commission has on occasion employed some rather unusual legal tactics when it

wished to avoid judicial review, but this ploy may well take the prize." Lutheran Church, 141 F.3d at 344.

Despite the ACLJ's Petition for Reconsideration, the Streamlining Order has not been rescinded. Paragraph 9 of the Streamlining Order showed a remarkable obtuseness concerning the standards enunciated in Corporation of Presiding Bishops v. Amos, 483 U.S. 327 (1987). Rather than lessen the burden placed on religion by the government, the Streamlining Order increased the burden. At least a portion of that burden has now found its way into the newly devised proposed guidelines.

Both paragraph 9 of the Streamlining Order as well as ¶ 71 of the Notice can only be accomplished by close monitoring by the Commission of religious broadcasters. The Streamlining Order allows government officials the ability to evaluate the hiring of co-religionists, and to determine "if there is evidence of lack of compliance, and take appropriate action if violations have occurred." Likewise, the Notice seeks to distinguish between "valid" religious positions and "any position for which religious belief is not made a qualifications requirements." The Notice does not set forth exactly how the FCC proposes to monitor and distinguish between religious and non-religious posts, but *the attempt to make such determinations is itself unconstitutional.*

The Supreme Court has reiterated the oft repeated principle that "religious freedom encompasses the power of religious bodies to decide for themselves, free from state interference, *matters of church government* as well as those of faith and doctrine." Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 722 (1976) (emphasis added); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). The application of the FCC's proposed affirmative recruitment standards

through monitoring and evaluation *is* tantamount to a state intrusion into the governmental affairs of a church.

For example, in Amos, a janitor at a non-profit Mormon gymnasium was fired because he was not a Mormon. Amos, 483 U.S. at 330. The janitor sued the Mormon Church claiming "religious discrimination" under Title VII, because his duties as a gymnasium janitor were too attenuated to be described as a governmental affair of the Mormon Church. *Id.* at 331. In unanimously rejecting the claim, the Supreme Court reiterated the principle that religious groups are in the best position to determine what is important to their structure and function:

> it is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.

Id. at 336. To avoid such determinations, the Court stated plainly that religious groups must be accommodated without State intervention in these areas: "There is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist *without sponsorship and without interference*." *Id.* at 334 (citation and internal quotation marks omitted, emphasis added). In other words, by entering the stream of commerce (or obtaining a broadcast license), as the Mormon Church did in Amos, religious institutions do not give up the right to make determinations about their own internal structure. Similarly, religious institutions that are Commission licensees can not be forced to give up these rights.

Paragraph 71 of the Notice as well as Paragraphs 6-8 of the Streamlining Order, do not create an exemption from the EEO regulations, they simply offer religious broadcasters the ability to use religious affiliation as a job qualification. Under the banner of "diversity" the FCC is not

empowered to meddle in the religious affairs of religious broadcasters, however. The Amos Court held, for example, that Section 702 of Title VII was constitutional because it was, "a statute neutral on its face and motivated by a *permissible purpose of limiting governmental interference with the exercise of religion.* . . ." Amos, 483 U.S. at 339 (Emphasis added). The FCC lacks the authority to enforce regulations in a manner which Congress has already declared to be off-limits for the Equal Employment Opportunity Commission; the federal agency tasked with enforcing EEO rules.

Additionally, the Amos decision was based upon constitutional principles, not simply those principles embodied by Congress in Section 702. As Justice Brennan stated in concurrence:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.
>
> ***The authority to engage in this process of self-definition inevitably involves what we normally regard as infringement on free exercise rights****, since a religious organization is able to condition employment in certain activities on subscription to particular religious tenets.*

483 U.S. at 342 (Brennan, J., concurring) (emphasis added). The idea that the Constitution *requires* a government agency not to become entangled in the structure of religious organizations is a theme throughout Amos, unanimously embraced by the Court.

The Free Exercise Clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." Abington School District v.

Schempp, 374 U.S. 203, 222 (1963). "[R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: *select their own leaders*, define their own doctrines, *and run their own institutions*." Amos, 483 U.S. at 341 (Brennan, J., concurring) (citations and internal quotation marks omitted, emphasis added). The principle is simple -- once one government agency is unfettered by constitutional constraints to dictate the structure of religious organizations, all government agencies are unconstrained to invade the province of the Church. Therefore, the FCC does not enjoy a special dispensation in ordering the affairs of religious organizations as a pretext for obtaining or maintaining a broadcast license.

In Little v. Weurl, 929 F.2d 944 (3rd Cir. 1991), the Third Circuit held that a Catholic school was exempted from a Title VII discrimination lawsuit for firing a teacher who divorced and remarried. In holding that applying Title VII to such church related activities would violate the Free Exercise and Establishment Clauses, the Court stated: "Quite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, churches have a ***constitutionally protected*** interest in managing their own institutions free of government interference." Little, 929 F.2d at 948 (emphasis added).

Similarly, in EEOC v. Presbyterian Ministries, Inc., 788 F. Supp. 1154 (W.D. Wash. 1992), the court rejected an assertion similar to the FCC's here. The Presbyterian Ministries court held that a Christian retirement home was not liable under Title VII for religious discrimination for firing a Muslim woman, because her religious activities did not comport with the Christian atmosphere of the home. The Court held that the Section 702 religious "exemption alleviates significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Presbyterian Ministries, 788 F. Supp. at 1157. The court also noted that, "the

§ 702 exemption exists to prevent such [governmental] intrusions ***and prevent an Establishment Clause violation***." Id. (Emphasis added). In other words, the purpose of § 702 (and the FCC's proposed rules here), is to prevent unconstitutional government entanglement in religious affairs.

At its essence, the application of a recruitment (hiring) standard to a religious organization penalizes that organization for a relationship, which under other circumstances, would be constitutionally protected. "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Sherbert v. Verner, 274 U.S. 398, 405 (1963). Consequently, the race/gender affirmative recruitment requirement which fails to fully account for the religious requirements of a particular religious broadcaster violates the constitutional principles enunciated in Amos.

Finally, the interstitial intra-religion monitoring proposed by the Notice (as well as in paragraph 9 of the Streamlining Order), to assure compliance with the affirmative recruitment requirements is unconstitutional. The Establishment clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." Everson v. Board of Educ., 330 U.S. 1, 18 (1947). On the contrary, "[s]tate power is no more to be used to handicap religions, than it is to favor them." *Id.*

The method which the FCC proposes to use in paragraph 71 of the Notice is through a determination that a "violation" occurred because a hiring decision was not sufficiently related to the religious purposes of the religious broadcaster. In Widmar v. Vincent, 454 U.S. 263 (1981), the Supreme Court stated in an analogous context:

> [the State] would need to determine which words and activities fall within "religious worship and religious teaching [and here, occupational qualification]." This alone could prove an impossible task in an age where many various beliefs meet the

> constitutional definition of religion. . . . There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

454 U.S. at 272 n.11. Similarly, the Commission would have to make determinations about whether a religious broadcaster's recruitment (hiring) decisions were sufficiently encompassed within its religious prerogatives to pass muster, and accomplish this through some type of intra-religious monitoring. If "it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," Employment Division v. Smith, 494 U.S. 872, 887 (1990), then it is equally outside of the purview of the Commission to enter into such constitutionally protected territory. The Commission should, therefore, exempt religious broadcasters altogether from any recruitment (or hiring or promotion) requirements.

B. The *Religious Freedom Restoration Act* Prohibits The Type Of Governmental Intrusion Proposed Here

The federal Religious Freedom Restoration Act ("RFRA"), 107 Stat. 1488 (1993), signed into law by President Clinton on November 16, 1993, expressly prohibits the type of governmental intrusion into religious freedoms proposed here. Section 3(a) explicitly requires that the Commission's race-based affirmative recruitment requirements be tempered in relation to the religious liberty rights at stake for religious broadcasters: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." RFRA § 3(a).

In City of Boerne v. Flores, 117 S.Ct. 2157 (1997), the Supreme Court held that Congress lacked authority under section 5 of the Fourteenth Amendment to enact RFRA, and hence RFRA is unconstitutional as applied to state governments. The Boerne rationale does not apply to Congress'

actions in the federal sphere, however. Indeed, the Commission recognized the applicability of RFRA in the Lutheran Church appeal.

RFRA sets forth two insurmountable obstacles for the FCC in the application of its race-based recruitment (and hiring) standards here. RFRA first states that the government may burden religious exercise *only* if the regulation is "in furtherance of a compelling governmental interest." RFRA § 3(b)(1). Mandating that religious affairs be conducted in a manner foreordained by the FCC, and coercing association (or disassociation) cannot be a compelling state interest.

For example, many religions discriminate on the basis of gender because of their religious beliefs (*e.g.,* Priests, Monks and Nuns in the Catholic faith, and male Rabbis in the Orthodox Jewish faith). Allowing religious faiths to so discriminate fulfills the requirements of the Free Exercise Clause of the First Amendment. *See* Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 868 (2d Cir.), *cert. denied*, 117 S.Ct. 608 (1996).

Second, RFRA requires that religious exercise may *only* be burdened if the government is employing "the least restrictive means of furthering that compelling governmental interest." RFRA § 3(b)(2). The least restrictive means for the government here is not to enforce racial/gender based affirmative recruitment standards that are unconstitutional, regardless of whether such standards are applied to religious or secular broadcasters.

Third, RFRA also mandates that the government must "demonstrate" that it has used the least restrictive means in abridging religious liberty rights. RFRA § 3(b). "Demonstrate" is defined as "the burden[] of going forward with the evidence and of persuasion." RFRA § 5(b)(3). Similar to the Adarand absence of proof justifying the EEO regulations, the FCC has made no demonstration

that a compelling reason exists for the application of these racial affirmative recruitment standards to *any* First Amendment activity, let alone to religious broadcasters specifically.

Consequently, pursuant to RFRA, the FCC must demonstrate a compelling interest for impinging upon the religious liberty rights of religious broadcasters through the application of the EEO requirements proposed in the Notice. Because no such evidentiary basis exists, no compelling interest exists which would justify the imposition of the type of strictures the FCC hopes to impose through the application of this standard. Ultimately, the recruitment guidelines would fall under a RFRA challenge.

VII. CONCLUSION -

The Commission has failed to meet its obligations on remand in the Lutheran Church case to show that it has the underlying authority to promulgate these "recruitment" rules. The Commission also notably fails to articulate a factual basis, as required in Lutheran Church, for implementing these new "recruitment" rules. Thus, any threat of sanctions for failing to comply with these presumptively unconstitutional rules is imminently open to challenge.

Respectfully submitted,

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